

Criminal offences during the arbitration

False testimony, fraud, defamation:
What should arbitrators do?

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Arbitral Tribunals today face challenges through misdeeds

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We are current and future
arbitrators

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MVE

Manuel Liatowitsch

Domitille Baizeau

Although these three already have almost as much experience as the other three
– at least almost everybody would recognize them in spite of the blurred pictures

We will be confronted with misdeeds in arbitration



We should know how to react to such misdeeds

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We should use experience but also
try to go new ways

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Draw from the knowledge and experience of sophisticated arbitrators

But ...

Also find new ways to deal with situations

The way most arbitral tribunals are currently dealing with misdeeds



In order to assess why I think it's necessary to also try to find new solutions to old problems we will first look at how arbitral tribunals in general deal with the problem today (for the most part).

The consequences arising out of this analysis are of course my personal point of view.

The topic is open to discussion – there is a wide range of possibilities and tribunals have a wide range of discretion.

Most tribunals do not address the issue in the award



Award



Examples:

Qatar vs. Bahrain – dispute over the border between Qatar and Bahrain – delimitation of boundaries between Bahrain and Qatar – especially Hawar islands which lie between Bahrain and Qatar. In 1939, Britain, the colonial power awarded sovereignty over the islands to Bahrain. Qatar was angered – years of arguments. On 8 July 1991, Qatar introduced claim against Bahrain before the ICJ (longest case in history) – Qatar had submitted 82 documents to support its claim – conclusion from those documents: the award of the islands to Bahrain was fraudulent. Letters were written by about anyone of importance when the British made the 1939 decision: letters from the adviser to the Emir of Bahrain, letters from Ottoman officials, letters from rulers of regional powers, including Abu Dhabi and Saudi Arabia, letters from the rulers of Bahrain themselves, from Sheikhs, from judges, etc.

Bahrain set up a task force to investigate the documents submitted: not only were they forged but forgery was blatant – a Royal Air Force Seal on an Ottoman map. Documents purporting to have been written year apart were created from the same sheet of vintage paper. On some seals, the crown of Elizabeth II was used on documents claiming to be before her reign. Others were written by people yet to be born or by officials who would have been ten years old at the time!

Qatar withdrew all documents. By an order “the Court, taking into account the concordant views of the Parties on the treatment of the disputed documents ... placed on record the decision of Qatar to disregard, for the purpose of the present case, the eighty-two documents whose authenticity had been challenged by Bahrain, decided that the Replies would not rely on those documents...”

Bahrain won the case but the judgment does not contain an evaluation of the above events.

Judge Fortier, ad hoc judge for Bahrain was the only one to address the issue after the award had been rendered: “I believe that the Court should not simply disregard and fail to take into consideration this unprecedented incident. In my opinion, these documents have “polluted” and “infected” the whole of Qatar’s case... I believe that the Court, in considering the Parties’ conflicting versions of the facts in this case, had a duty to do more than merely narrate the Parties’ respective exchange of letters following Bahrain’s challenge of the authenticity of 82 documents which loomed as central to Qatar’s case. I regret that it elected not to do so.”

Forged evidence is likely to be disregarded but the issue is not addressed

Award



Tribunals are likely to debate the issue – yes.

But address? – One other example from own practice: clearly forged document was identified at the hearing. The document was not addressed in the award (besides the points made by the opposing party). The opposing party also argued that the behaviour should have a relevance on costs; still not addressed but costs shifted to that party for a different reason!

Not covered by presentation:

Cementownia vs. Turkey: Claimant alleged that Respondent had put witnesses and counsel under surveillance – Tribunal issued an order that directed the Republic of Turkey to immediately discontinue all forms of surveillance or interference of communications directed at Claimant and its counsel (a day after the application, without having heard Respondent's position yet) – Respondent thereafter stated that Claimant and its representatives were under surveillance for other purposes (criminal investigations) than for the purpose of obtaining information about the ongoing arbitration proceedings – statement by counsel: we have not made use of intercepts results from the prosecutor's office in conjunction with this arbitration "Given the seriousness of the matters raised by the Claimant, the extensive investigation by Respondent's counsel that it has provoked, and the fundamental importance of such a representation to the proper administration of the arbitration, the Tribunal accepts that statement." – in the end: claim dismissed and Claimant had to bear all the costs and Turkey's legal costs because of the way the proceedings went

Tendency of international judges and arbitrators when faced with an issue of misdeed in arbitral proceedings is often to avoid any sort of direct confrontation. Probable reason: most arbitrators consider their duty to decide the case and that from the moment the claim of the other party which is at the origin of the misdeed is dismissed, it is not appropriate or useful to blame further – fundamental issue concerning the role of the arbitrator: should the arbitrator limit himself to deciding the dispute and avoid anything which might trouble the peaceful atmosphere of the arbitral setting, or does he have moral or legal duties which impose an obligation to go beyond this.

Why maybe other ways should be contemplated



The misdeeds committed might constitute crimes in the country the arbitration is seated



Forged documents – Art. 251 StGB

False testimony and perjury of a party – Art. 309, 306 I and II StGB

False testimony and perjury of a witness – Art. 309, 307 I and II StGB

Defamation – Art. 174 StGB, Art. 152 StGB

Fraud – Art. 146 StGB

Immunity of the witness in common law jurisdictions for substantive tort law

Civil liability of lying witnesses? E.g. § 826 German BGB, Art. 41 II Code of Obligations – contra bonos mores “gegen die guten Sitten” - / § 823 II / Art. 41 I OR – protective law (e.g. fraud in a criminal sense);

Plus: **civil liability of the party for breach of the arbitration agreement?**

ICC case: witness admitted during testimony that he had lied in his statement and that the documents the communication of which had been requested by the other party had not been shredded but indeed still existed and were in the possession of his lawyer sitting next to him!

All intentional torts – negligence is not punishable

Legal obligation to report? - § 21 Zurich StPO “Behörden und Beamte haben ihnen bekannt gewordene strafbare Handlungen anzuzeigen, die sie bei Ausübung ihrer Amtstätigkeit wahrnehmen. Ausgenommen von dieser Pflicht, aber zur Anzeige berechtigt, sind Beamte, deren berufliche Aufgabe ein persönliches Vertrauensverhältnis zu einem Beteiligten oder zu einem seiner Angehörigen voraussetzt.” § 167 (Zeuge) 156 (Partei): “Eine Partei, die der falschen Beweisaussage zur Sache dringend verdächtig ist, wird der zuständigen Untersuchungsbehörde verzeigt [...] – New: § 167 GOG

Should it be the arbitrators to report? Or the other party? Hanotiau: “I think it is normally the parties and not the arbitrators who should report a case of **unethical conduct on the part of a lawyer or an expert** to the bar or other professional authorities. If a particular misdeed could be categorized as a criminal offence, parties should report to the district attorney. The arbitrators should if necessary draw the attention of the parties to their responsibilities in this respect.”

Does **confidentiality** beat any duty the arbitrators might have to report? – Confidentiality given in the first place – depends on the seat of arbitration and the institutional rules chosen (e.g. Art. 43 Swiss Rules, Art. 30 (1) LCIA Rules as opposed to ICC Rules) – even in spite of legal duty to report one might justify the disclosure? – Again open points for discussion.

Obstructed arbitrations lead to more costs and time spent than necessary



Obstruction of arbitral process: Uncitral award 1999 **Himpurna California Energy Ltd (HCE) vs. Republic of Indonesia (ROI)** – Dispute arose from two arbitration awards ordering PLN a state-owned Indonesian electricity utility to pay approximately USD 572 in damages to HCE and PPL two Bermudan corporations owned by US investors which had entered into a number of agreements for the purpose of developing and operating a geothermal electricity generation facility in Indonesia. PLN did not honour the award, ROI was guarantor and HCE initiated arbitration against ROI for payment; ROI tried everything to avoid the arbitration and to obstruct the proceedings – Pertamina (instrumentality of the ROI) filed a law suit in Indonesia to enjoin the new arbitration cases initiated against ROI; judge at Jakarta central district court issued an order enjoining the pursuit of the cases and imposing a penalty of US 1 million per day on any party that violated the order; arbitral tribunal did not comply with the injunction and held the ROI in default; arbitrators considered that ROI had statutory dominion over Pertamina and that the courts of Indonesia were instrumentalities of the ROI; Tribunal held that to prevent a tribunal from fulfilling its mandate in accordance with the procedures formally agreed by the ROI in the terms of appointment was a denial of justice; Art. 16 (2) UNCITRAL Rules: hearings in The Hague, leaving the seat in Jakarta; ROI more extreme means: Indonesian arbitrator was abducted when arriving in Amsterdam airport – nonetheless the two remaining arbitrators pursued the arbitration – interim award that ROI had defaulted to submit documentary evidence without legitimate reason leading to the conclusion that the award could be rendered based on the evidence before the “truncated” tribunal – final award held that ROI should not benefit from its arbitrator’s absence (authorities in international law supporting the ability of the two remaining members of the tribunal to proceed to a final award despite the inability of the third to participate)

More likely to be successfully challenged by set aside or otherwise:

European Gas: Westman undertook to assist Alsthom (predecessor of European Gas Turbines) in obtaining first the “prequalification and then the contract for the supply of gas turbines for a petrochemical project in Arak, Iran.”
Prequalification was a first selection by main contractor designed to limit the number of companies to submit an offer.

Westman was to receive a commission fee covering the expenses of all nature borne by Westman in order to perform its task; Alsthom was prequalified but refused to pay commission; Westman initiated ICC Arbitration in Paris; Tribunal requested from Westman a detailed report of its expenses, submitted a list for a total of SF 7,104,983, including salaries for personnel and rent for offices in Teheran – award in favor of Westman;

Alsthom sought annulment of the award before Paris court of appeal – (i) violation of public policy because award gave effect to a contract which real goal was traffic in influence and bribery, (ii) based on fraudulent report of expenses – expert report by an accounting firm showed that Westman had not paid any rent or salaries for the Arak prequalification;

(i) Dismissed because no proof that illicit contract

(ii) Partially well founded, some parts of the award were affected by the fraud committed. Court annulled award in so far as it was based on Westman’s fraudulent accounts, applying the general principle of law *fraus omnia corrumpit*

States have to stand behind arbitration as dispute settlement mechanism



In the end it is the respective state that is guaranteeing arbitration as a means of dispute settlement.

The arbitrator also has a duty towards the institution of arbitration as such;

Yves Derains in *Les tendances de la jurisprudence arbitral international*, Clunet 93, 829, 846: *“L’arbitre a des devoirs vis-à-vis des parties pour le compte desquelles il remplit sa mission, mais il en a aussi vis-à-vis de la communauté du commerce international, la Societas Marcatorum, laquelle a besoin à la fois de l’arbitrage et de relations harmonieuses avec les Etats. Or, s’il suffisait de recourir à arbitrage pour se soustraire à des lois de police ayant un titre légitime à s’appliquer, c’est bientôt la survie de l’arbitrage lui-même qui serait mise en cause par les Etats qui l’ont favorisé jusqu’ici. L’arbitrage international est un instrument au service des parties et à cet égard, il est indispensable qu’il préserve son autonomie vis-à-vis des Etats. Mais cette autonomie n’est acceptable par la communauté internationale que si l’arbitrage est capable d’être autre chose que le comptable d’intérêts particuliers et s’il sait sauvegarde un certain nombre de valeur supérieures à ces intérêts.”*

Lando in *Conflicts of Lawrules for Arbitrators*, Festschrift für Zweigert 1981, 157, 172: *“The arbitrator will have to consider not only the interests of the parties but also those of international commercial arbitration considered as an institution.”*

For these reasons:

Public policy considerations
should overrule
party autonomy

This is of course a personal opinion and subject to debate.

Should the arbitrator limit himself to deciding the dispute and avoid anything which might trouble the peaceful atmosphere of the arbitral setting, or does he have moral or legal duties which impose an obligation on him to go beyond this?

Arbitrators as guardians of international public policy?

As the learned colleagues cited above state – there is more at risk than just the “peaceful atmosphere” of this one arbitration in case parties start to make use of arbitration as their means to settle “disputable” disputes.

There should be no room for
misdeeds in arbitration



Arbitrators as witnesses in ensuing court proceedings? – Not part of the presentation

England: yes as long as only the procedure as such is subject of the interrogation
– leading case: Duke of Buccleuch

France: different approach – arbitrators enjoy legal privilege similar to judges:
“The arbitrator is not a third party in relation to the dispute which he has decided. On accepting his functions, he assumes the status of a judge, as a result of the contract appointing him. He therefore enjoys the same rights and is subject to the same duties as a judge, and it is not legally possible for a judge to be heard in person in proceedings to which he is not a party.” (Paris, Cour d’Appelle, 29 May 1992, Rev Arb 1996, 408)

Switzerland: According to Art. 102 Swiss Supreme Court Act BGG – deadline to the AT to comment on the motion to set aside. No comments, no consequences.

The parties should not see a benefit in choosing arbitration to conceal their real aim



Disregard forged evidence?? – Not part of the presentation – Maybe for questions

Franqui (Spain vs. Venezuela) case *“le tribunal arbitral demeurera libre d’employer, pour s’éclairer, tous les genres de preuves qu’il croira nécessaires; et il ne sera lié, à cet égard, par aucune restrictions qu’on rencontre dans les lois positives, spécialement quant à l’administration de la preuve testimoniale.”* (10 R. INT’l Arb. Awards 751 (1903))

Reisman & Freedman, *The Plaintiff’s Dilemma: Illegally Obtained Evidence and Admissibility in International Adjudication*, American Journal of International Law, Vol. 76, 1982, p. 737:

“Documentary, testimonial, and real evidence has frequently been accepted for consideration even when irregularly presented. Despite the intermittent storms over this matter in domestic law, strong opposition to the near lack of international evidentiary barriers has never really developed. The general consensus of practitioners and commentators alike is that stricter rules of admissibility are wholly inappropriate for international arbitration or adjudication.”

Art. 6 European Convention on Human Rights? – very narrow: neither a violation of national law nor the violation of the Convention when obtaining evidence does per se lead to a duty to disregard such evidence (criminal proceedings) – rather: right to a fair trial: whether consideration of the evidence would affect the right to involvement of the counterparty (“Mitwirkungsrechte”) – possibility to defend against evidence; objective reliability argues for consideration

“Fruit of the poisonous tree”

However – freedom of arbitral tribunal to assess the evidence before it!

Duty to render an enforceable award?? Art. 35 ICC Rules: “In all matters not expressly provided for in these Rules, the Court and the Arbitral Tribunal shall act in the spirit of these Rules and shall make every effort to make sure that the Award is enforceable at law.”

The parties should be made aware
that misleading tribunals is not
the way to win a case



An arbitral tribunal should clearly address the issues in an award.

Because if addressed expressly in the respective award there might be a chance that parties acknowledge that arbitration is not the place for forgeries and fraud but a business oriented dispute settlement mechanism.

The arbitral tribunal should think about referring the parties to the respective legal provisions which could have been breached – then leave it up to the parties what they do with such referral.

Should the arbitral tribunal itself report? – in my view too far reaching.

Thank you

Fraud on the judgment – Not part of the presentation – Maybe for questions

Art. 123 (1) BGG Swiss Supreme Court Act – Revision possible in case false testimony and the award was based on this testimony

Famous case of “Frigates of Taiwan” – Taiwan approached French government to purchase frigate warships from Thomson-CSF (now Thalès) – supported by the French state until China expressed objections – at the request of its then foreign minister, Roland Dumas, withdrew authorization for the deal – Thomson-CSF signed an agreement with Frontier AG Bern (behind that vehicle was Mr Sirven) in 1990 under which Frontier would assist in completing the transaction for 1% of purchase price – nature of the services rendered was at the core of the arbitration that ensued when Thomson did not pay although deal went through in 1991. Decisive for: illicit traffic d’influence in France or licit lobbying in China. Frontier AG argued that licit, because purpose was to overcome reluctance of Chinese government through the services of Mr Kwan a well connected Elf-Aquitaine consultant in China. Thomson: illicit because Mr Kwan’s intervention’s real purpose was to pay a third party who was able to neutralize French veto. – relying on testimony by Sirven: licit and ordered payment in 1996

Criminal investigations in France ensued against Mr Sirven in 1997. In October 2008 (Sirven has meanwhile deceased) an order of dismissal was issued. In this order the object of the agreement was described as illegal commission scheme – work by Mr Kwan was a pure fabrication and in reality a public relations representative in a relationship with Roland Dumas should have “softened” Dumas stand to overcome the French veto. French magistrat concluded that Sirven committed fraud on the judgment by submitting false testimony.

Federal Tribunal set aside the award (4A_596/2008) and remanded the case for a new decision